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No. 86-522

In the Supreme Court of the United States

OCTOBER TERM, 1986

COLORADO INTERSTATE GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), authorized the Federal Energy Regulatory Commission to order petitioner to refund to its customers the portion of a rate increase that the Commission found unlawful.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 791 F.2d 803. The opinion of the Federal Energy Regulatory Commission (Pet. App. 17a-21a) is reported at 27 F.E.R.C. ¶ 61,315. The Commission's order denying rehearing (Pet. App. 22a-25a) is reported at 28 F.E.R.C. ¶ 61,083.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1986, and a petition for rehearing was denied on July 2, 1986 (Pet. App. 16a). The petition for a writ of certiorari was filed on September

29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Natural Gas Act, 15 U.S.C. 717 *et seq.*, empowers the Federal Energy Regulatory Commission to regulate the rates charged by natural gas pipelines for sales of natural gas. Section 4 of the Act, 15 U.S.C. 717c, governs the Commission's review of pipelines' rate changes. It provides that, upon the filing of a new rate schedule, the Commission may "enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service" (15 U.S.C. 717c(e)). The Commission may suspend the operation of the new rate schedule for up to five months; the schedule may then go into effect, but the Commission may require the pipeline company "to refund, with interest, the portion of such increased rates or charges by its decision found not justified" (*ibid.*). The statute states that "the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company" (*ibid.*).

The Commission's authority over natural gas rates is not limited to reviewing rate changes. Section 5(a) of the Act, 15 U.S.C. 717d(a), states that "[w]henever," after a hearing, the Commission finds that a rate, charge, classification, rule, practice, or contract is "unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." The Commission has no authority to order retrospective relief in a proceeding under Section

5(a); "the rate found by the Commission to be just and reasonable becomes effective prospectively only" (*Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U.S. 378, 389 (1959)).

2. Petitioner is an interstate natural gas pipeline company whose rates are regulated by the Commission under the Natural Gas Act. Natural Gas Pipeline Company of America (NGPCA) is one of petitioner's principal customers. NGPCA purchases natural gas from petitioner under two different rate schedules: one schedule governs petitioner's field sales (the F-1 rate) and another, higher, schedule applies to sales from petitioner's main pipeline (the H-1 rate). As the court of appeals explained, "[e]ach rate has two components, a commodity charge and a demand charge. The commodity charge includes all variable costs (mainly the cost of the gas) plus certain fixed costs. The demand charge includes all fixed costs not allocated to the commodity charge" (Pet. App. 2a). The commodity charge component of these two rates included a minimum bill provision requiring NGPCA "to take or pay for 90% of the volume of gas to which it is contractually entitled" (*ibid.*). The minimum bill provision, which was contained in a service agreement between petitioner and NGPCA, essentially established a minimum commodity charge, requiring NGPCA to pay the specified amount for the gas even if it did not take delivery of that quantity of gas during the relevant time period. The provision stated that charges incurred for failure to take the specified minimum quantity of natural gas would be calculated on the basis of the lower F-1 rate. *Ibid.*

In March 1982, petitioner filed revised tariffs with the Commission pursuant to Section 4 of the Natural

Gas Act that, among other things, increased both of the rates charged to NGPCA. Petitioner did not propose any change in the minimum bill provision. The Commission invoked its authority under Section 4 to suspend the effectiveness of the new rates and ordered a public hearing concerning the lawfulness of those rates. The suspension expired in September 1982; the rates then took effect subject to refund. Pet. App. 2a-3a; *Colorado Interstate Gas Co.*, 19 F.E.R.C. ¶ 61,071 (1982).[1]

Settlement negotiations during the administrative proceedings led to the resolution of all issues except for NGPCA's claim that the minimum bill provision was unjust and unreasonable.[2] Following a hearing, the administrative law judge found that the minimum bill provision was unlawful (*Colorado Interstate Gas Co.*, 25 F.E.R.C. ¶ 63,012 (1983)). The ALJ first determined that "[f]or purposes of reviewing the minimum bill provisions and determining the burden of proof, * * * Section 4 is the applicable provision of the Natural Gas Act" (*id.* at 65013). He noted that one effect of the proposed rate increases would be to raise the charge that petitioner could impose under the minimum bill provision (*id.* at 65015):

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[1] After the new rates went into effect, NGPCA failed to purchase the amount of gas specified in the minimum bill provision, thereby incurring a $20 million deficiency charge. Pet. App. 4a.

[2] The administrative law judge certified this partial settlement to the Commission (*Colorado Interstate Gas Co.*, 22 F.E.R.C. ¶ 63,040 (1983)), and the Commission approved the settlement (*Colorado Interstate Gas Co.*, 22 F.E.R.C. ¶ 61,330 (1983)).

> [T]he proposed rate increase inflates the impact of the minimum bill provisions which are components of the entire rate design. Unlike other aspects of the longstanding service agreement which have no different impact upon a purchaser after a rate increase, the charges which can be collected under minimum bill provisions flex in tandem with a rate increase. Clearly, the minimum bill provisions are an integral part of the rate increase, thereby placing upon [petitioner] the Section 4(e) burden of proving such minimum bill provisions just and reasonable.

On the merits, the ALJ found that "the current 90 percent minimum bill provisions exceed by their terms, the reasonable costs incurred by [petitioner's] service to [NGPCA]. The current provisions are not shown to be the best alternative to achieve the underlying objectives of the provisions." 25 F.E.R.C. at 65018; see also *id.* at 65020-65021. The ALJ found that petitioner was entitled to set its rate so as to ensure recovery of the fixed costs that it incurs in serving NGPCA, but that petitioner was not entitled to recover variable costs through the minimum bill. He therefore directed petitioner to substitute for the minimum bill provision a monthly minimum demand charge covering the fixed costs allocated to the F-1 and H-1 rate schedules. *Id.* at 65021.

3. The Commission upheld the ALJ's conclusion that petitioner's minimum bill provision was unlawful, but disagreed as to the proper remedy (Pet. App. 17a-21a). The Commission stated that its finding that the minimum bill provision was not just and reasonable did "not rest solely on the ground that [petitioner] failed to meet its burden of proof. There is ample evidence in the record demonstrating that

[petitioner's] minimum bill is not just and reasonable" (*id.* at 18a). The flaw in the provision, the Commission concluded, was that it allowed recovery of variable as well as fixed costs; the Commission stated that "a minimum commodity bill limited to recovery of the pipeline's fixed costs would be just and reasonable" (*id.* at 19a).

The Commission found that the monthly demand charge imposed by the ALJ did not appropriately limit the minimum bill to recovering petitioner's fixed costs. It stated that (Pet. App. 19a):

> [T]his goal can be better achieved simply by eliminating variable costs from the minimum bill. This would give [petitioner] an inducement to maintain or increase its sales to [NGPCA] above the contract minimum because [petitioner] could charge the full volumetric rate, including fixed and variable costs, on all gas sold above the contract minimum. And fixed costs include return on equity. The demand charge proposed by the [ALJ], on the other hand, provides no such incentive because it would enable [petitioner] to recover all fixed costs, including full return on equity, allocated to [NGPCA] regardless of the amount of gas * * * purchased.

It therefore ordered petitioner to amend the minimum bill provision to eliminate recovery of variable costs.[3]

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[3] The Commission's determination with respect to this question is consistent with the rule that the Commission adopted on the same date that it issued the decision here, which requires all pipelines to eliminate variable costs from their minimum bill provisions. See *Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144 (D.C. Cir. 1985), cert. denied, No. 85-1219 (May 19, 1986).

Finally, the Commission concluded that its decision regarding the minimum bill would be retrospective to the date that the suspended rates were placed into effect, and that petitioner therefore was obligated to refund the charges it had collected pursuant to the minimum bill provision. The Commission noted that in accepting the settlement of the other issues in the case it had stated that "the minimum bill issue had been severed and that the [settlement] order was without prejudice to any [subsequent] finding or order" in this proceeding (Pet. App. 20a). It concluded that because petitioner's new rates initially had been suspended pursuant to Section 4(e), "relief from [petitioner's] unjust and unreasonable minimum bill can be retrospective" (Pet. App. 20a).

Petitioner sought rehearing with respect to the Commission's determination that retrospective relief was appropriate. The Commission denied rehearing, rejecting petitioner's claim that the Commission lacked the authority to review the minimum bill provision under Section 4 of the Natural Gas Act (see Pet. App. 22a-25a). The Commission observed that it "has authority to review an existing rate practice in a section 4 proceeding when the existing practice is an integral part of the manner in which the rate is charged. In our view, [petitioner's] minimum bill provision clearly meets this test. A provision which requires a purchaser to pay for gas whether or not it is taken is integral to a determination of whether the overall revenue level is just and reasonable" (*id.* at 24a (citations omitted)). Thus, the Commission found "no question" regarding its authority to review the minimum bill provision under Section 4.[4]

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[4] The Commission also rejected petitioner's claim that its prior acceptance of the service agreement between petitioner

4. The court of appeals unanimously affirmed (Pet. App. 1a-15a), rejecting petitioner's claim that the Commission lacked authority to review the minimum bill provision under Section 4. The court observed that "Section 4 of the Natural Gas Act gives the Commission broad authority to scrutinize new rates filed by a gas company to insure that such rates are just and reasonable. The Commission may review a gas company's rate structure to insure that all parts of the structure—both old and new—operate together to produce just and reasonable rates. By filing the rate increase, a gas company assumes the risk of having to justify its entire rate structure, including integral provisions of that structure which the company does not propose to change" (Pet. App. 6a (citations omitted)).

The court upheld the Commission's finding that petitioner's rate increase "elevated the impact of the minimum bill," noting that the minimum bill "guarantees a large and constant source of payment for [petitioner]" and that "[t]his guaranteed payment has a major impact on [petitioner] and its rate structure" (Pet. App. 8a). The court concluded that "[t]he Commission's determination that the minimum bill is an integral aspect of [petitioner's] rate structure and therefore is subject to § 4 review is supported by substantial evidence" (*ibid.*).

The court further noted that the rate suspension order issued by the Commission "specifically provided

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and NGPCA (which contained the minimum bill provision) eliminated its authority to order a retroactive refund. The Commission stated that its "acceptance of the service agreement cannot be taken as an acceptance of the minimum bill clause as just and reasonable under section 4 of the NGA." Pet. App. 25a.

for retroactive refund" and "preserved the Commission's power to revise each integral provision of the rate structure, including the minimum bill provision, retroactively" (Pet. App. 8a). The Commission's order regarding the settlement of the issues other than the dispute over the minimum bill "in no way eliminated or limited the Commission's authority to order [a] refund" in connection with its review of the lawfulness of the minimum bill (*ibid.*). The court accordingly upheld the refund order issued by the Commission.[5]

ARGUMENT

The decision of the court below is correct and does not present a conflict with any decision of this Court or another court of appeals. Further review by this Court therefore is not warranted.

1. Petitioner does not challenge the Commission's determination that the minimum bill provision was unlawful; its sole claim is that the Commission lacked the authority to order a refund of the minimum bill charges that petitioner collected during the period following suspension of the new rates. Petitioner apparently contends that the Commission's finding that the minimum bill provision was unjust and unreasonable was an exercise of the Commission's authority under Section 5(a) and that the Commission accord-

[5] The court of appeals rejected petitioner's argument that retroactive relief was barred by the service agreement between petitioner and NGPCA (Pet. App. 8a-11a). It also held that the Commission properly concluded that the revised minimum bill provision filed by petitioner in order to comply with the Commission's decision invalidating the prior minimum bill did not satisfy the standard set out in the Commission's decision (*id.* at 11a-15a).

ingly could not utilize its Section 4(e) authority to order a refund. This argument rests upon a fundamental misunderstanding of the scope of Section 4(e).

Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), generally authorizes the Federal Energy Regulatory Commission to examine the rates charged by companies regulated under the Act. If the Commission finds that any element of a company's rate schedule is not just and reasonable, it must "determine the just and reasonable [provision] * * * and shall fix the same by order." Section 4(e), 15 U.S.C. 717c(e), applies only to new rate schedules filed by companies regulated under the Act, as to which the Commission has all the same powers as under Section 5(a),[6] plus two additional powers. First, the Commission may suspend a new rate schedule for a period of up to five months. Second, if the Commission does not act within the five-month period, the suspended rate may become effective but the Commission may "order [the] natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified" (15 U.S.C. 717c(e)). In sum, in a Section 4(e) proceeding, the Commission reviews not only the lawfulness of the *changes* effected by the new schedule but the lawfulness of the resulting *rates*, and may order a refund of whatever portion of the resulting rate is determined to be unlawful.

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[6] Section 4(e) provides that "the Commission may make such orders with reference [to the new rate schedule] as would be proper in a [Section 5(a)] proceeding initiated after it had become effective."

This Court has previously examined the relationship between Section 4(e) and Section 5(a). It stated that "[t]he basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential' " (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956)). The Court further observed that

> Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power, in the case of a newly changed rate or contract * * * the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful.

Ibid. (emphasis in original); see also *FPC* v. *Hunt*, 376 U.S. 515, 522 (1964).

The Commission's authority to review a gas company's rate, charge, or practice under Section 4(e)—and order a refund if the rate, charge, or practice is found unlawful—is thus not limited to review of the changes effected by the new schedule but includes any rate or practice that is an element of a newly changed

rate.[7] The mere fact that the company's rate filing does not alter a prior rate provision or practice does not preclude examination of the unchanged provision or practice under Section 4(e). Instead, "the Commission [may] review[] a revised rate completely to assure that all its parts—old and new—operate in tandem to insure a 'just and reasonable' result and [may] order[] refunds if the previously approved [tariff provision] operates with new provisions to produce an over-recovery." *Cities of Batavia* v. *FERC*, 672 F.2d 64, 77 (D.C. Cir. 1982); see also *Florida Gas Transmission Co.* v. *FERC*, 741 F.2d 1307, 1311 (11th Cir. 1984); *North Penn Gas Co.* v. *FERC*, 707 F.2d 763, 769 (3d Cir. 1983); *Laclede Gas Co.* v. *FERC*, 670 F.2d 38, 42 (5th Cir. 1982); cf. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 152 (1962) (the policy of the Natural Gas Act is that a company that initiates a rate increase "assumes the hazards involved in that procedure,"

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[7] In addition, of course, the Commission must have suspended the new rate in order to subsequently exercise its refund authority (see 15 U.S.C. 717c(e)). Petitioner asserts that the Commission lacked authority to order a refund because "the minimum bill provision was not suspended" (Pet. 5 n.2). But the Commission's suspension order applied to the entire new rate and did not exempt the minimum bill (*Colorado Interstate Gas Co.*, 19 F.E.R.C. ¶ 61,071, at 61111 (1982)). The Commission rejected petitioner's contention (Pet. App. 20a, 24a-25a), and the court of appeals found (*id.* at 8a) that the Commission's suspension order preserved its power to revise the minimum bill provision retroactively. Petitioner provides absolutely no support for its assertion that these concurrent determinations should be rejected by this Court.

and therefore "bears the burden of establishing its rate schedule as being 'just and reasonable' ").[8]

The Commission must examine the interrelationship among all of the elements of a gas company's new rate in order to carry out its statutory responsibility to determine whether the charges to be imposed upon the company's customers are just and reasonable. The "increased rate" is not embodied solely in the elements of the rate schedule that actually are altered by the gas company. The rate necessarily embraces a variety of underlying assumptions and methodologies—some new, some unchanged from previous rate filings—that interact together to fix the payments that will be required of the gas company's customers.

Here, for example, petitioner's new rate schedule did not alter the terms of the minimum bill, but the charges that petitioner could impose under the minimum bill increased as a result of the increase in petitioner's rates. The court below therefore correctly concluded (Pet. App. 6a-8a) that the minimum bill provision was reviewable under Section 4(e) because the rate increase "elevated the impact of the minimum bill" (Pet. App. 8a). Since the minimum bill provision was reviewable under Section 4(e), the

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[8] *Cities of Batavia*, involved a Commission rate proceeding under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d, 824e, statutory provisions that are identical in all relevant respects to Sections 4 and 5 of the Natural Gas Act. This Court previously has stated that decisions involving these two statutes may be cited interchangeably. *E.g., Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

Commission plainly could exercise its authority to order a refund under that provision.[9]

Contrary to the argument now advanced by petitioner, the fact that the Commission prescribed the terms of the minimum bill provision that petitioner could lawfully impose, instead of simply invalidating the minimum bill, did not bar the Commission from exercising its authority to order retroactive relief. Indeed, this Court's decision in *FPC* v. *Tennessee Gas Transmission Co.*, *supra*, indicates that retroactive relief is completely appropriate in these circumstances. The rates filed by the company in that case were predicated on a 7% rate of return; the Commission found that only a 6⅛% return rate was justified, ordered the company to file rate schedules reflecting that return, and directed the refund of the difference. The Court found that "[t]he company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate" (371 U.S. at 153).

The courts of appeals have applied the same rule in cases in which the Commission has reviewed an unchanged rate provision under Section 4(e) and

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[9] Petitioner intimates (Pet. 2) that this Court's decision in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), restricted the scope of review under Section 4(e). But the Court simply observed (406 U.S. at 645) that the Commission reviews "tariff amendments" under Section 4(e); it did not in any way indicate that the scope of the Commission's review was limited to provisions physically contained in a gas company's rate filing.

prescribed alterations to the rate provision. They have concluded that where the entire rate was suspended pursuant to Section 4(e), the changes prescribed by the Commission may be imposed retroactively. *North Penn Gas Co.* v. *FERC*, 707 F.2d at 769; *Laclede Gas Co.* v. *FERC*, 670 F.2d at 42.

Here, as in *Tennessee Gas* and the cases decided by the courts of appeals, the Commission reviewed newly-filed rates under Section 4(e), found that a provision relating to the company's rates was unjust and unreasonable, prescribed the manner in which the provision should be reformed to satisfy the statutory standard, and ordered a refund of the charges imposed pursuant to the unlawful provision. That course of action plainly was authorized by Section 4(e).[10]

Indeed, the contrary view espoused by petitioner would mean that petitioner could retain charges imposed pursuant to the minimum bill provision even though that provision was suspended under Section 4(e) and the Commission subsequently found that charges imposed pursuant to the minimum bill were unlawful. Where a gas company is on notice that the charges that it collects are subject to refund under Section 4(e), there is no reason why the Commission should be precluded from exercising its au-

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[10] Petitioner attempts (Pet. 11 n.4) to distinguish the decisions of the courts of appeals affirming the Commission's refund authority on the ground that those decisions involve "rate levels" rather than tariff provisions. But Section 4(e) does not distinguish between rate levels and other provisions that affect the charges paid by a company's customers; it permits review of all of the relevant provisions. There is thus no reason why the Commission's authority to require refunds should turn upon that artificial distinction.

thority to order a refund of excessive charges. Indeed, the conclusion that the Commission may order a refund in these circumstances follows from this Court's statement in *United Gas Pipe Line Co.* that Section 4(e) *supplements* the Commission's Section 5(a) authority (see page 11, *supra*). On that view, the Commission may exercise its authority under the two provisions in tandem, prescribing the new minimum bill provision under Section 5(a) and ordering a refund under Section 4(e).

2. Petitioner argues that the decision below conflicts with the decisions of other courts of appeals. However, none of the decisions cited by petitioner is relevant here; all of them address the unrelated question of whether the Commission—rather than the gas company—must bear the burden of proof where the Commission directs a company to replace a provision in a newly-filed rate with a provision prescribed by the Commission.

Section 4(e) provides that "the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company"; in proceedings under Section 5(a), the party challenging the rate bears the burden of proof. Some courts of appeals have concluded that where "the Commission imposes a [rate] change not proposed by the natural gas company—including *an alteration in an unchanged part of a proposed higher rate*—it must first find that the existing provision is unjust or unreasonable" and that the Commission bears the burden of establishing this fact. *ANR Pipeline Co.* v. *FERC*, 771 F.2d 507, 514 (D.C. Cir. 1985) (emphasis in original); see also *Sea Robin Pipeline Co.* v. *FERC*, 795 F.2d 182, 186-187 (D.C. Cir. 1986); *New Orleans Public Service, Inc.* v. *FERC*, 659 F.2d

509, 521 & n.18, 524 (5th Cir. 1981); *Public Service Comm'n* v. *FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980), cert. denied, 454 U.S. 879 (1981).[11]

Petitioner does not argue that the Commission failed to carry its burden of proof in the present proceeding; indeed, the Commission expressly found (Pet. App. 18a) that "ample evidence" in the record affirmatively demonstrated that petitioner's minimum bill was not just and reasonable. Petitioner's theory appears to be that the Commission cannot order a refund where it bears the burden of proof because the Commission's order in that situation rests upon Section 5(a) rather than Section 4(e). But the decisions of the courts of appeals upon which petitioner relies do not hold that the Commission's refund authority is restricted in this manner; the courts' holdings are limited to the burden of proof question. These decisions therefore do not present a conflict requiring resolution by this Court.[12]

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[11] We express no view regarding the correctness of these decisions regarding the allocation of the burden of proof.

[12] The court of appeals in *Sea Robin Pipeline Co.* did state that the order at issue in that case "exceed[ed] the Commission's authority under section 5 because it mandates retroactive relief." 795 F.2d at 189 n.7; see also *id.* at 187. But that statement is clearly dictum. The court had already invalidated the Commission's order on the ground that the Commission failed to carry its burden of proof (*id.* at 187-189); there was no need to discuss whether the order also was invalid because the Commission lacked the authority to order a refund.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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